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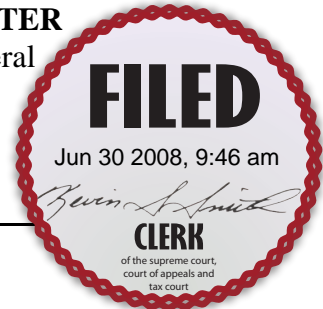
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**IN THE
COURT OF APPEALS OF INDIANA**

SAMUEL PETERS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 79A02-0712-CR-1151

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0608-FA-14

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Samuel Peters appeals his sentence as well as the trial court's order requiring him to pay public defender costs. We affirm in part and remand in part.

Issues

- I. Is a twenty-five year sentence inappropriate in light of the nature of Peters's offense and his character?
- II. Did the trial court err by ordering Peters to pay public defender costs without conducting an indigency hearing?

Facts and Procedural History

On August 25, 2006, police were conducting surveillance of Peters's house on North 8th Street in Lafayette. They saw a black male leave the residence and go to a nearby Village Pantry store, where he met with a woman. Police later stopped the woman, and she told them that she had purchased \$20 worth of crack cocaine from the man, whom she called "Sam." She said that she had purchased cocaine from him several times. Later that day, police saw a car drive up and park in front of Peters's house. A male passenger got out of the car and entered the residence, while another man remained in the driver's seat. A short time later, the passenger got back in the car, and the men drove away. When police pulled them over, the passenger admitted that he had purchased cocaine from "Sam" on this occasion and on many past occasions as well.

The next day, at the request of law enforcement, a confidential informant called Peters and arranged to purchase from him \$50 worth of cocaine. The informant made the controlled buy, and the substance Peters sold to the informant tested positive for cocaine.

After gathering this and other information about alleged drug activity at the North 8th Street house, police obtained a search warrant. When police arrived at Peters's house and announced their intention to search the premises, Peters fled the scene but was quickly apprehended. During their search of the house, police found five children inside. Police also recovered more than \$5000 in cash, marijuana, crack cocaine, a razor blade with white residue, and several baggies with the corners cut off.¹ In Peters's car, police found three baggies of cocaine. Peters's residence was within 1000 feet of a daycare facility and an elementary school. Police interviewed Peters's girlfriend, who was living at the house with her two children. She told police that Peters frequently sold cocaine from their residence and from his car.

On August 30, 2006, the State charged Peters with class A felony conspiracy to commit dealing in cocaine. On August 31, 2006, the State added three counts of class A felony dealing in cocaine and one count each of the following: class B felony possession of cocaine, class A misdemeanor possession of marijuana, class D felony maintaining a common nuisance, and class A misdemeanor resisting law enforcement. On January 5, 2007, the State added habitual substance offender and habitual offender charges. On September 18, 2007, a plea agreement was filed with the trial court, reflecting Peters's agreement to plead guilty to one count of dealing in cocaine as a class A felony in exchange for the State's dismissal of the other nine charges. The parties also agreed that any executed sentence would be capped at thirty years.

¹ According to the affidavit of probable cause filed in this case, baggie corners are commonly used by persons dealing controlled substances. Appellant's App. at 13.

On October 15, 2007, the trial court sentenced Peters to twenty-five years. The trial court also ordered Peters to pay \$200 to the Tippecanoe County Public Defender's office. This appeal ensued.

Discussion and Decision

I. Appropriateness of Sentence

First, Peters argues that his twenty-five year sentence is inappropriate and asks us to revise it pursuant to Indiana Appellate Rule 7(B), which states,

The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.

It is the defendant's burden to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

Pursuant to Indiana Code Section 35-50-2-4, "[a] person who commits a Class A felony shall be imprisoned for a fixed term of between twenty (20) and fifty (50) years, with the advisory sentence being thirty (30) years." At sentencing, the trial court explained why it decided on a twenty-five year sentence in this case:

Defendant has—as an aggravating factor has a lengthy criminal record, including narcotic sales going back to 1998. Another charge, it looks like it's dealing in 2005, although it's not absolutely clear what that is. A possession charge in 1998 and one in [19]96. Or two in [19]96 that were stricken from the docket with leave to reinstate. As a mitigating factor the defendant pleaded guilty and took responsibility for his crime and shows remorse today. Because of the defendant's prior convictions this is non-suspendable. Also as a factor to be taken into account the defendant has received the benefit of the plea agreement by avoiding additional charges and avoiding the habitual substance offender charge. Did—defendant has, as far as I can tell, no positive contacts

in the community. There does appear to be at least one sibling who lives in Lafayette, but his other family is in Chicago. He appears to have been living mainly in Chicago at the time that this occurred. And his fiancé[e] lives in Chicago. So I don't ordinarily consider that factor in determining whether the community's resources should be involved in the defendant's rehabilitation. I'm going to impose a sentence of twenty-five years, all executed in the Department of Correction.

Tr. at 42-43.

Regarding the nature of the offense, the advisory sentence of thirty years is the starting point the legislature has selected as an appropriate sentence for dealing in cocaine as a class A felony. *Anglemeyer v. State*, 868 N.E.2d 482 (Ind. 2007). Even though Peters received a sentence shorter than the advisory sentence, he contends that the twenty-five year term is “inappropriately severe” because the dealing in cocaine charge to which he pled guilty involved the controlled buy staged by police and not something more egregious, such as a sale to a child or “some unfortunate drug addict.” Appellant's Br. at 15. We agree with the State that this argument is not persuasive. Clearly, Peters did not know that the person he sold cocaine to on this occasion was an informant rather than an addict. Moreover, Peters sold cocaine from the house he shared with his girlfriend and her two children, thus showing his lack of concern as to how his dealing might endanger others.

As for Peters's character, he claims that his criminal history is fairly insignificant and that he has the love and support of many family members. He also blames his crimes on his addiction to drugs and states that he needs treatment “now[.]” *Id.* In our view, Peters's criminal history is very significant considering that he has three prior convictions for drug-related felonies, two in 1998 and one in 2005. It appears that he is resistant to rehabilitation, as his prior prison terms and drug treatment did not deter him from reoffending. Also,

Peters’s claim that members of his own family “think highly of [him]” is not particularly impressive, for obvious reasons. *Id.* Finally, Peters argues that his seven-month-old son will suffer for lack of Peters’s emotional and financial support. Peters failed to mention his son to the trial court at sentencing and has therefore waived the argument for our review. *See Burgess v. State*, 854 N.E.2d 35, 40 (Ind. Ct. App. 2006) (defendant’s failure to raise proposed mitigating circumstances at sentencing precludes him from raising them on appeal). Waiver notwithstanding, Peters fails to explain how his child’s needs are relevant to his claim of good character. If anything, the fact that Peters cannot be present in his young son’s life because he chose to sell cocaine reflects rather poorly on his character. Finally, we agree with Peters that he needs substance abuse treatment, and we note that the trial court recommended that he receive such treatment in prison.

Taking all of the above into account, Peters has failed to persuade us that his twenty-five-year sentence—five years less than the advisory sentence and only five years more than the minimum sentence for a class A felony—is inappropriate in light of the nature of his offense and his character.

II. Public Defender Costs

Peters claims that the trial court erred by ordering him to pay \$200 in public defender costs without conducting an indigency hearing. There are three statutes governing the issue of when a defendant must pay such costs.² Indiana Code Section 33-37-2-3 provides, in relevant part:

² The trial court failed to cite a particular statute as the basis of its order imposing costs.

a) [W]hen the court imposes costs, it shall conduct a hearing to determine whether the convicted person is indigent.

....

(e) If, after a hearing under subsection (a) ..., the court determines that a convicted person is able to pay part of the costs of representation, the court shall order the person to pay an amount of not more than the cost of the defense services rendered on behalf of the person.

Indiana Code Section 33-40-3-6 states that if at any stage of a criminal prosecution the trial court makes a finding that the defendant with a court-appointed public defender is able to pay the costs of representation, the trial court shall order the defendant to pay reasonable attorney fees and/or costs of legal services rendered. Finally, Indiana Code Section 35-33-7-6 states that if the trial court determines that the defendant is able to pay part of the cost of representation by court-appointed counsel, it shall order the person to pay a fee of \$100 for a felony action and \$50 for a misdemeanor action.

In sum, pursuant to all three statutes, the trial court must explicitly find that the defendant is able to pay any costs imposed. Peters claims that the trial court's appointment of appellate counsel amounted to an implied finding that he was indigent. However, a finding of indigency for appointing appellate counsel is not conclusive as to a defendant's ability to pay costs. *Vestal v. State*, 745 N.E.2d 249, 253 (Ind. Ct. App. 2001), *aff'd in relevant part by* 773 N.E.2d 805 (Ind. 2002). The State even concedes that the trial court likely erred by failing to comply with applicable statutory requirements.

Based on the above, we hereby affirm Peters's sentence of twenty-five years and remand to the trial court for the limited purpose of conducting a hearing to determine Peters's ability, or lack thereof, to pay public defender costs. *See id.* (if defendant is ordered to pay costs without an indigency hearing, the proper remedy is to remand for such a hearing).

Affirmed in part and remanded in part.

BARNES, J., and BRADFORD, J., concur.